IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RHONDA CRONIN, D.P.M., STEVEN FINER, D.P.M., BRUCE SHOEMAKER, D.P.M., and ROBERT WENTWORTH, Plaintiffs,	:	**CIVIL ACTION**
v.	:	
U.S. PROFESSIONAL CONSULTANTS, and ROBERT WEISBERG, D.O., Defendants.	:	**NO. 00-5239**

ORDER AND MEMORANDUM

ORDER

AND NOW, this 13th day of March, 2001, upon consideration of plaintiffs' Complaint (Document No. 1, filed Oct. 16, 2000), Defendants' Motion to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) (Document No. 2, filed January 10, 2001), Plaintiffs' Answer to Defendants' Motion to Dismiss (Document No. 5, filed February 26, 2001), and Reply Brief in Support of Defendants' Motion to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) (Document No. 6, filed March 6, 2001), for the reasons set forth in the attached Memorandum,

IT IS ORDERED that Defendants' Motion to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) (Document No. 2) is **GRANTED** and the action is **DISMISSED** for lack of subject matter jurisdiction.

MEMORANDUM

I. INTRODUCTION

Plaintiffs are doctors of podiatric medicine, who, at various times until 1991, entered into contracts with defendant U.S. Professional Consultants ("U.S.P.C.") to provide medical services at nursing homes with which U.S.P.C. had contracts to provide these services. Plaintiffs aver that defendant Robert Weisberg ("Weisberg") was the executive medical director of a company, Gerimed Corporation, which owned the nursing homes; plaintiffs also allege that he was a medical director at many of the facilities and an attending physician at most of them. Compl. ¶ 8.

In early 1995, plaintiffs claim that Weisberg informed them that the individual facilities at which they had been performing services has been sold and that, even though U.S.P.C. had entered into new service provider contracts with the new owners, plaintiffs would have to sign new agreements with U.S.P.C. as a result of the changes in ownership. Id. ¶ 10.

Plaintiffs assert that each of them signed new employment contracts, based on the representations made by Weisberg. They contend that the new contracts have resulted in a significant reduction in compensation for services performed under the contracts. Id. ¶ 11.

Plaintiffs allege that one or both of the defendants has violated the terms of Title XVIII of the Social Security Act, 42 U.S.C. § 1395 ("Social Security Act" or "Medicare Act") by demanding that plaintiffs sign new service agreements. Compl. ¶ 14. Plaintiffs further allege that (a) the 1995 agreements were obtained as a result of Weisberg's wilful misrepresentation and are void; (b) one or both defendants received a greater share of the income generated by plaintiffs' services than the share that would have resulted under the 1991 agreements; and

(c) the agreements entered into in 1995 interfered with plaintiffs' rights to perform services. Id. ¶¶ 15–17.

Claiming that the controversy arises out the Social Security Act, 42 U.S.C. § 1395, et seq., plaintiffs contend that this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331. Compl. ¶ 5. Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction on January 10, 2001. Plaintiffs filed their response February 26, 2001. Defendants then filed a reply on March 6, 2001.

II. DISCUSSION

When considering a motion under Federal Rule of Civil Procedure 12(b)(1), the court is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." Mortensen v. First Federal Sav. and Loan Ass'n, 549 F.2d 884, 891 (3rd Cir. 1977). Moreover, the party asserting jurisdiction, the plaintiff in this case, bears the burden of persuasion. See Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc., 227 F.3d 62, 69 (3d Cir. 2000) (citing Mortensen).

It is well established that, in order to establish subject matter jurisdiction pursuant to 28 U.S.C. § 1331, a plaintiff's claims must arise under federal law. For "a claim to arise 'under the Constitution, laws, or treaties of the United States,' 'a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." Phillips Petroleum Co. v. Texaco, 415 U.S. 125, 127, 94 S. Ct. 1002, 1003–04, 39 L. Ed. 2d 209 (1974) (quoting Gully v. First National Bank in Meridian, 299 U.S. 109, 112, 57 S. Ct. 96, 97, 81 L. Ed. 70 (1936)).

The question of whether a claim "arises under" federal law must be determined by evaluating the complaint. See Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986) (citing Franchise Tax Board, 463 U.S. at 9–10, 103 S. Ct. at 2846–47); see also Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429, 96 L. Ed. 2d 318 (1987) ("The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint."). See generally Louisville v. Nashville R.R. Co. v. Mottley, 211 U.S. 149, 29 S. Ct. 42, 53 L. Ed. 126 (1908).

The vast majority of cases falling under the court's federal question jurisdiction are those in which federal law creates the cause of action. However, as the Supreme Court has determined, even where state law creates the cause of action under which a case is brought, a "case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1, 13, 103 S. Ct. 2841, 2848, 77 L. Ed. 2d 420 (1983). Notwithstanding this seemingly broad language, as the Supreme Court concluded in Merrell Dow, "a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.'" Merrell Dow, 478 U.S. at 817, 106 S. Ct. at 3237 (quoting 28 U.S.C. § 1331).

The Court of Appeals for the Third Circuit, interpreting Merrell Dow, has explained "that a private federal remedy for violating a federal statute is a prerequisite for finding federal question jurisdiction." Smith v. Industrial Valley Title Ins. Co., 957 F.2d 90, 93 (3d Cir. 1992). However, "Congress has not, statutorily, provided any private federal right of action or remedy under the Medicare or Medicaid Acts." Estate of Ayres v. Beaver, 48 F. Supp. 2d 1335 (M.D. Fla. 1999) (citing 42 U.S.C. §§ 1395, 1396).

In this case, plaintiffs do not claim that federal law creates the causes of action asserted. Rather, plaintiffs allege that they performed services within the scope of Title XVIII of the Social Security Act (Compl. ¶ 9) and that defendants violated the terms of Title XVIII of the Social Security Act (Compl. ¶ 14). Specifically, plaintiffs aver that one or both defendants violated various sections, including, but not limited to, 42 U.S.C. § 1395e(2), f, and g(4),[1] provisions which concern payment for services.

The statute on which plaintiffs rely sets forth federal requirements regarding the provision of, and compensation for, Medicare services. See 42 U.S.C. § 1395, et seq. It does not establish a private remedy for doctors who provide services that fall within the scope of the act. To the contrary, the statute provides for enforcement of the Medicare Act by the federal government. See 42 U.S.C. § 1395nn(g).

In the absence of a congressional determination that there should be a private, federal cause of action for violations of the Medicare Act, plaintiffs cannot state a claim arising under federal law. See Merrell Dow, 478 U.S. 804, 106 S. Ct. 3229; Smith, 957 F.2d 90; Estate of

[1] Plaintiffs' complaint cites to 42 U.S.C. §§ 1395(e)(2) and 1395g(4). These provisions do not exist. The Court assumes that plaintiff intended to refer to 42 U.S.C. § 1395e(a)(2) or (b)(2) instead of § 1395e(2) and § 1395g(e)(4) or § 1395nn(g)(4) instead of § 1395g(4).

Ayres, 48 F. Supp. 2d 1335. Even though plaintiffs' claims may touch on the construction of the Medicare Act, plaintiffs' claims are essentially state law claims for tortious interference with contract and/or breach of contract.

III. CONCLUSION

The Court concludes that plaintiffs' claims do not arise under federal law and there is no other basis of federal jurisdiction. Therefore, Defendants' Motion to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction is granted.[2]

BY THE COURT:

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JAN E. DUBOIS, J.

[2] The Court notes that a related action is pending in the Common Pleas Court of Montgomery County, Pennsylvania, in which plaintiffs have been named as defendants. As defendants in the state court action, Drs. Cronin, Finer, Shoemaker and Wentworth filed a counterclaim asserting violations of Title XVIII of the Social Security Act, 42 U.S.C. § 1395, et seq., which are similar to the claims at issue in this case. See Defs.' Answer, New Matter and Counterclaim in U.S. Professional Consultants v. Cronin, et al., Civil Action No. 99-16526 (Common Pleas Court, Montgomery County) (Exhibit 2 to Def.'s Mot. to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(1)).